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No. 08–1393

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

STEPHEN EDWARD MAY,

Petitioner,

VS.

STATE OF ARIZONA,

Respondent.

On Petition for Writ of Certiorari to Division One of the Court of Appeals of the State of Arizona

BRIEF IN OPPOSITION

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QUESTION PRESENTED

During trial, in his opening and reply briefs to the Arizona Court of Appeals, and in his petition for review to the Arizona Supreme Court, Petitioner maintained that, contrary to state law, the jury instructions on the charged child-molestation offenses incorrectly identified "lack of sexual motivation" as an affirmative defense that he had to prove by a preponderance of the evidence. In an untimely motion for reconsideration of the Arizona Supreme Court's order denying his petition for review, Petitioner presented the new argument that the child-molestation statutes in effect when he committed his crimes unconstitutionally lowered the State's burden of proof by designating "lack of sexual motivation" an affirmative defense. The Arizona Supreme Court denied this motion, as well as the Arizona Attorneys for Criminal Justice's affiliated motion for leave to appear as *amicus curiae*. Petitioner now seeks a writ of certiorari from this Court to challenge the constitutionality of Arizona's child-molestation statutes under the Fourteenth Amendment's Due Process Clause.

Does this Court lack jurisdiction under 28 U.S.C. § 1257(a) to grant a writ of certiorari in this case? Alternatively, should this Court deny review because Petitioner's constitutional argument was neither pressed nor passed upon by the Arizona judiciary as a result of his failure to challenge Arizona's molestation statutes on Fourteenth Amendment grounds until he filed his untimely motion for reconsideration from the state supreme court's summary denial of discretionary review?

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OPINION BELOW

The Court of Appeals' memorandum decision, *State v. May*, 2008 WL 2917111 (Ariz. App. Jul. 24, 2008), is unreported. Pet. App. 1–11. The Arizona Supreme Court's order denying review without comment is also not reported. Pet. App. 24; Resp. App. 29a.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The version of A.R.S. § 13–103 in effect at the time of Petitioner's offenses provided as follows:

> A. All common law offenses are hereby abolished. No conduct or omission constitutes an offense unless it is an offense under this title or under another statute or ordinance.
>
> B. For the purposes of this section, "affirmative defense" means a defense that is offered and that attempts to justify the criminal actions of the accused or another person for whose actions the

> accused may be deemed to be accountable. Affirmative defense does not include any defense that either denies an element of the offense charged or denies responsibility, including alibi, misidentification or lack of intent.[1]

Arizona's child-molestation statute, A.R.S. § 13–1410, reads, in pertinent part, as follows:

> A. A person commits molestation of a child by intentionally or knowingly engaging in or causing a person to engage in sexual contact, except sexual contact with the female breast, with a child who is under fifteen years of age.

A.R.S. § 13–105.10, which defines "intentionally" and "knowingly" as the "culpable mental state[s]" applicable to Arizona's criminal offenses, reads as follows:

> "Culpable mental state" means intentionally, knowingly, recklessly or with criminal negligence as those terms are defined in this paragraph:
>
> (a) "Intentionally" or "with the intent to" means, with respect to a result or to conduct described by a statute defining an offense, that a person's objective is to cause that result or to engage in that conduct.

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[1] After Petitioner's commission of the charged offenses, but before his trial, the Arizona Legislature amended A.R.S. § 13–103(B) by substituting "excuse" for "justify." *See* 2006 Laws Ch. 199, § 2, effective April 24, 2006; Resp. App. 34a. The Arizona Supreme Court subsequently held that Senate Bill 1145, which included this amendment to A.R.S. § 13–103(B), lacked retroactive effect and would thus "apply only to offenses occurring on or after its effective date of April 24, 2006." *Garcia v. Browning*, 151 P.3d 533, 537, ¶ 20 (Ariz. 2007).

> (b) "Knowingly" means, with respect to conduct or to a circumstance described by a statute defining an offense, that a person is aware or believes that the person's conduct is of that nature or that the circumstance exists. It does not require any knowledge of the unlawfulness of the act or omission.

The version of A.R.S. § 13–205 in effect at the time of Petitioner's offenses provided as follows:

> A. Except as otherwise provided by law, a defendant shall prove any affirmative defense raised by a preponderance of the evidence, including any justification defense under chapter 4 of this title.[2]
>
> B. This section does not affect the presumption contained in § 13–411, subsection C and § 13–503.

A.R.S. § 13–1401.2, which sets forth the statutory definition of "sexual contact," provides:

> "Sexual contact" means any direct or indirect

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[2] After Petitioner committed the charged offenses, but before his trial, the Arizona Legislature amended A.R.S. § 13–205(A) by striking the text identifying justification defenses as affirmative defenses, and by requiring the prosecution to disprove beyond a reasonable doubt any justification defense that the defendant raised at trial. *See* 2006 Laws Ch. 199, § 2, effective April 24, 2006; Resp. App. 35a. Because the legislature did not give this statute retroactive effect, the post-April 24, 2006 version of A.R.S. § 13-205 that Petitioner appended to his brief, Pet. App. 27, is inapposite. *See Garcia*, 151 P.3d at 536-37, ¶¶ 14-21.

> touching, fondling or manipulating of any part of the genitals, anus or female breast by any part of the body or by any object or causing a person to engage in such contact.

A.R.S. § 13–1407, the statute setting forth the "Defenses" available for the sexual offenses defined in Chapter 14 of Arizona's criminal code, reads, in pertinent part, as follows:

> E. It is a defense to a prosecution pursuant to § 13–1404 or 13–1410 that the defendant was not motivated by a sexual interest.

Arizona Rule of Criminal Procedure 16.1 provides, in pertinent part, as follows:

> a. Scope of rule. This rule shall govern the procedure to be followed in cases between arraignment and trial, unless specifically provided by another rule. Rules 16.1 and 16.2 shall apply to criminal proceedings in all courts.
>
> b. Making of motions before trial. All motions shall be made no later than 20 days prior to trial, or at such other time that the court may direct. . . .
>
> c. Effect of failure to make motions in timely manner. Any motion, defense, objection, request not timely raised under Rule 16.1(b) shall be precluded, unless the basis therefor was not then known, and by exercise of reasonable diligence could not then have been known, and the party raises it promptly upon learning of it.

Arizona Rule of Criminal Procedure 31.25, which governs the filing of *amicus* briefs on direct review, is lengthy and thus has been reproduced in the attached appendix. Resp. App. 36a-37a.

STATEMENT OF THE CASE

On February 15, 2006, the State charged Petitioner, Stephen Edward May, with eight counts of child molestation, class 2 felonies and dangerous crimes against children, in violation of A.R.S. §§ 13–1410 and –604.01. (P.I., Item 1.) The indictment alleged that Petitioner had committed these crimes between the dates of June 1, 2005, and September 30, 2005. (*Id.*) After the trial court granted Petitioner's motion to sever Count 8 from the other charges, Petitioner's trial on Counts 1 through 7 commenced on January 2, 2007. (*Id.*, Item 29; M.E., Items 43, 47.) The jury ultimately acquitted Petitioner on Counts 5 and 6, but convicted him of molesting three children no older than 9 years old—Luis A., Danielle A., and Taylor S.[3] (R.T. 1/3/07, at 47, 66, 113-14; M.E., Item 233.)

Luis testified at trial that Petitioner, then an aide at Taven Elementary school, molested him inside a classroom by slipping his left hand underneath Luis' desk and resting it on top of Luis' "private part" (penis) while helping Luis solve a computer problem. (R.T. 1/3/07, at 21-26, 33, 36-38, 40-44, 51-52; R.T. 1/4/07, at 7-9, 20.) Both Danielle and Taylor testified that Petitioner had manually touched their vaginas over their bathing suits on two separate occasions, at their apartment complex's swimming pool. (R.T. 1/3/07, at 70-77, 83-84, 100, 105-06, 116-25, 135-37; R.T. 1/4/07, at 109, 114; R.T. 1/8/07, at 83-85; R.T. 1/9/07, at 44-49, 54-55.) During pretrial interviews, Petitioner claimed not to remember Luis and denied even accidentally touching Danielle and Taylor's genitalia while in the swimming pool. (R.T. 1/8/07, at 89-90, 93.) During trial, however, Petitioner acknowledged the possibility that he might "have touched [Danielle and Taylor]

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[3] The State dismissed Count 8 after Petitioner's trial. (R.T. 1/18/07, at 4-12.)

in the general areas of their genitals," but disavowed ever touching their vaginas intentionally, knowingly, or with any sexual motivation. (R.T. 1/10/07, at 39-41, 56.)

Petitioner requested a jury instruction that required the State to prove "beyond a reasonable doubt that [he] intentionally or knowingly, and with the motivation of a sexual interest, directly or indirectly touched . . . any part of the genitals . . . of a child under 15 years of age." Pet. App. 35. In support of his position that "the State [was] obligated to prove a motivation of sexual interest as an element of the offense," Pet. App. 38, Petitioner relied exclusively upon Senate Bill 1145's amendments to the statutory definition of "affirmative defense" set forth in A.R.S. § 13–103 (B):

> My reference is to the amended Senate Bill 1145,[4] effective date April 24, '06, which, in effect, abolishes common law and affirmative defenses. In pertinent part, the amended Arizona Revised Statutes 13–103B states [that an] affirmative defense does not include any justification defense or [a] defense that either denies an element of the offense charged or denies responsibility, including misidentification or lack of intent.
>
> My view is that that establishes that there is no necessity remaining as there was under the previous circumstance where lack of intent would be an affirmative defense for the defendant to prove by a preponderance of the evidence that allegation. I believe that with the amendment to the statute, the State is obliged to prove beyond a reasonable doubt

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[4] The appendix to this brief reproduces the pertinent text of SB 1145. Resp. App. 34a-35a.

> that the defendant was motivated by sexual interest. I think that is part of the offense that's charged.

Pet. App. 38-39.

The trial court deferred ruling on Petitioner's proposed instruction to afford the State time to respond. Pet. App. 39-40. The prosecutor ultimately opposed this instruction on three grounds: (1) A.R.S. § 13–1410 (A) did not include sexual motivation as an element of child molestation; (2) A.R.S. § 13–1407 (E) established "lack of sexual motivation" as an affirmative defense that A.R.S. § 13–205 (A) required Petitioner to prove by a preponderance of the evidence; and (3) the recent amendments to A.R.S. §§ 13–103 and –205(A) affected only the *justification* defenses set forth in Chapter 4 of Arizona's criminal code. Pet. App. 41-42, 45-51. Petitioner responded by reiterating his position that, under "the current state of [A.R.S. Section] 13–103, it is the state's burden to prove a lack of sexual motivation beyond a reasonable doubt." Pet. App. 43.

The trial court sustained the State's objection to Petitioner's submitted child-molestation instruction. Pet. App. 41-42. Because Petitioner intended to argue his lack of sexual motivation to the jury, Pet. App. 42-43, the trial court gave the following jury instructions, over his objection:

> The crime of molestation of a child requires proof that the defendant knowingly touched, directly or indirectly, the genitals of a child under the age of 15. It's a defense to child molestation that the defendant was not motivated by sexual interest.
>
> The defendant has raised the affirmative defense of lack of sexual motivation with respect to the charged offense of child molestation. The burden of

> proving each element of the offense beyond a reasonable doubt always remains on the State. However, the burden of proving the affirmative defense of lack of sexual motivation is on the defendant. The defendant must prove the affirmative defense of lack of sexual motivation by a preponderance of the evidence. If you find that the defendant has proved the affirmative defense of lack of sexual motivation by a preponderance of the evidence, you must find the defendant not guilty of the offense of molestation of a child.

Pet. App. 53-54.

In his subsequent motion for a new trial, Petitioner alleged that this jury instruction incorrectly restated "the burden of proof and standard of proof . . . regarding the defense of sexual motivation or sexual interest." Resp. App. 2a. Once again, Petitioner relied exclusively upon "Senate Bill 1145" and "the most recent amendments to A.R.S. § 13–103" to argue that "the defense of lack of sexual motivation or sexual interest [] codified in A.R.S. § 13–1407 (E)" was no longer an affirmative defense that defendants had to prove. Resp. App. 2a-3a. Petitioner predicated this statutory-construction argument upon the legislature's substitution of the word "excuse" for "justify" in A.R.S. § 13–103(B), which redefined 'affirmative defense" as including only those defenses "that attempt[] to **EXCUSE** the criminal actions of the accused." Resp. App. 3a (emphasis in original.) Petitioner concluded that the court should have instructed the jury that the State had to prove his sexual motivation beyond a reasonable doubt because: (1) the lack of sexual motivation was a *justification* defense falling outside the amended statutory definition for "affirmative defense"; and (2) Petitioner's conduct was justified because he "acknowledged

the possibility of unintended or accidental touching" during the charged molestation incidents. *Id.*

Despite being afforded an opportunity to supplement his written arguments, Petitioner elected to "rest on the content of his motion [for new trial]." Resp. App. 6a. Thus, Petitioner never contended before the trial court that Arizona's child-molestation statutes violated the Fourteenth Amendment's Due Process Clause by requiring defendants to prove the non-existence of "sexual motivation" as an affirmative defense, pursuant to A.R.S. § 13–1407 (E).

Before the Arizona Court of Appeals, Petitioner likewise failed to challenge the constitutionality of Arizona's child-molestation statutes, A.R.S. §§ 13–1410 (A) and –1407(E). Instead, Petitioner relied upon these statutes to argue that the trial court's jury instructions contradicted the Arizona Legislature's alleged intent to assign the prosecution the burden of proving sexual motivation. Petitioner accordingly framed his opening brief's first issue as follows: "Isn't the defendant entitled to a new trial when *the trial judge* placed the burden on him to prove lack of sexual motivation?" Resp. App. 12a (emphasis added). Petitioner thereafter argued that "the *jury instructions* unconstitutionally placed the burden of proof on [him]," because the trial court allegedly misconstrued the type of defense that the Arizona Legislature intended to establish in A.R.S. § 13–1407 (E). Resp. App. 12a-15a (emphasis added).

Petitioner preliminarily noted the existence of two different types of defenses: (1) "affirmative defenses," which are "specifically recognized and defined by the legislature, must be raised by the defendant and can 'justify' or 'excuse' conduct that is otherwise criminal"; and (2) "legal defenses," which "go[] specifically to whether the prosecution has

carried its burden of proving each essential element to the crime—at least when specific intent is at issue." Resp. App. 12a-13a (quoting *United States v. Cameron*, 907 F.2d 1051, 1063 (C.A.11 1990)). Petitioner asserted that A.R.S. § 13–1407 (E) established a "legal defense" to an element of child molestation that the State needed to disprove beyond a reasonable doubt because: (1) this statute allowed defendants to "raise the defense that any touching of a child under the age of 15 was not sexually motivated," Resp. App. 13a-14a; and (2) Arizona "[c]ase law explains that sexual motivation constitutes a specific intent component of [child molestation], and is an essential element of it," Resp. App. 14a (citing *State v. Brooks*, 586 P.2d 1270 (Ariz. 1978), and *State v. Turrentine*, 730 P.2d 238 (Ariz. App. 1986)).

Petitioner next claimed that the Arizona Legislature manifested its intention to designate "lack of sexual motivation" a "legal defense" in two additional ways. First, Petitioner noted that A.R.S. § 13–1407 (E) labeled the "lack of sexual motivation" a "defense," not an "affirmative defense," and claimed that this "word choice" "illuminat[ed] the legislature's intent." Resp. App. 14a. Second, Petitioner contended that the defense of "lack of sexual motivation" fell outside A.R.S. § 13–103 (B)'s definition of "affirmative defense," which excluded "any defense that denies an element to the offense charged . . . including . . . *lack of intent*." (Emphasis added.) Characterizing "lack of sexual motivation" as a defense that alleged such a "lack of intent," Petitioner argued that A.R.S. § 13–103(B)'s text constituted "yet another illustration of . . . the legislative intent" not to classify "lack of sexual motivation" as an affirmative defense. Resp. App. 14a-15a.

After concluding that A.R.S. § 13–1407 (E) established a "legal defense," Petitioner asserted that this "distinction" between "affirmative" and "legal" defenses made a "big

[difference]" in his case because "A.R.S. § 13–205 applying as it does to only affirmative defenses, did not shift the burden of proof, by a preponderance or otherwise, to [him]." Resp. App. 15a. Petitioner consequently concluded, "This means that we are left with the cherished principle and constitutional due process right, imposing upon the state the burden to establish each element of the offense beyond a reasonable doubt." *Id.* (citing *In re Winship*, 397 U.S. 358, 364 (1970); U.S. Const. Amends. 5, 14; and Ariz. Const. Art 2, § 4). Accordingly, Petitioner argued that "the relief" to which he was entitled was not the invalidation of Arizona's molestation statutes, but rather "[a] new trial with instruction that the state must prove the presence of sexual motivation beyond a reasonable doubt." Resp. App. 16a.

After Petitioner filed his opening brief, the Arizona Court of Appeals issued an opinion in a different child-molestation case, wherein it held that the trial court was *not* required to instruct the jury that the State had to prove the defendant's sexual interest in child-molestation cases because: (1) A.R.S. § 13–1407 (E) established an affirmative defense that the defendant had to prove by a preponderance of the evidence; and (2) the Arizona cases that required proof of the defendant's "motivation by sexual interest" as an element of child molestation were "not persuasive" in construing "the current version of A.R.S. § 13–1410 enacted in 1993, which differs from the previous version as the current version does not contain the language 'knowingly molests.'" *State v. Simpson*, 173 P.3d 1027, 1029-31, ¶¶ 15-22 (Ariz. App. 2007).

In its answering brief, Respondent accordingly cited *Simpson* to refute Petitioner's contention that sexual motivation was an element of the current child-molestation statute, and thus maintained that the trial court's jury instructions properly allocated to Petitioner the burden of

proving the "lack of sexual motivation" affirmative defense by a preponderance of the evidence. Resp. App. 19a; Answering Brief, at 15-17.

In his reply brief, Petitioner did *not* argue that, if *Simpson* were correct, the Arizona Legislature had violated the Fourteenth Amendment's Due Process Clause by deleting "knowingly molests" from its current version of A.R.S. § 13–1410. Instead, Petitioner resorted to several rules of statutory construction to argue that the Arizona Legislature's true intent was to retain sexual motivation as an element of the current child-molestation statute:

> A key point that the State fails to address is that both the title of A.R.S. §13–1410.A and its contents refer to "molestation." The word choice formed the keystone of *State v. Brooks* and *State v. Turrentine*, where the statute in question used the word "molests." Oddly, the cases upon which the State relies fail to mention this fact. *It is important to remember that the legislature is presumed to know of the judicial interpretation of a statute and to approve it when it retains the same language in the statute after amendment. That principle applies here, so that the term "molestation" retains an element of sexual motivation.*

Resp. App. 20a-21a (footnotes omitted; emphasis added).[5]

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[5] Petitioner alternatively sought to distinguish *Simpson* on the ground that the defendant in that case had not "raise[d] the defense [of lack of sexual motivation], either legally or affirmatively," and classify its holdings as "*obiter dictum*." Resp. App. 19a.

On July 24, 2008, the Arizona Court of Appeals affirmed Petitioner's convictions in an unpublished memorandum decision. Pet. App. 1-11. The court first addressed Petitioner's argument that "the superior court erred in instructing the jury that lack of sexual motivation is an affirmative defense that he was required to prove by a preponderance of the evidence [because] the State should have the burden to prove beyond a reasonable doubt that he acted with the requisite sexual motivation." Pet. App. 3. Finding "no reason why *Simpson* does not dispose of this issue," the court held that "the superior court did not abuse its discretion in instructing the jury that [Petitioner] had the burden to prove he was not motivated by sexual interest when he touched the victims' genitals through their clothes." Pet. App. 4-5. Because Petitioner never alternatively challenged the constitutionality of Arizona's child-molestation statutes, the memorandum decision was silent on whether the Arizona Legislature's 1993 amendment to A.R.S. § 13–1410 (a) violated the Fourteenth Amendment. In fact, the court of appeals disposed of Petitioner's argument exclusively on statutory-construction grounds and consequently never referenced the federal constitution at all. *Id.*

In his petition for review to the Arizona Supreme Court, Petitioner once again failed to argue that Arizona's child-molestation statutes, as construed by *Simpson*, violated the Fourteenth Amendment's Due Process Clause. Instead, Petitioner claimed that the characterization of "the defenses in A.R.S. § 13–1407" as "affirmative defenses that the defendant, not the state must prove" was a "result . . . imposed by the *appellate courts*, *not* by *the legislature*." Resp. App. 24a (emphasis added). Petitioner consequently framed the issue on review as follows: "Did *the Court of Appeals* erroneously shift the burden of proof to the

defendant, to prove that he was not sexually motivated?" Resp. App. 25a (emphasis added). Petitioner thereafter resorted to several rules of statutory construction to challenge the court of appeals' determinations in *Simpson* and his own case that A.R.S. § 13–1407(E) established an "affirmative," as opposed to a "legal," defense. Resp. App. 26a-28a. Petitioner concluded that he was "entitled to a new trial, with the burden of proof properly allocated to the state, beyond a reasonable doubt." Resp. App. 28a. Petitioner, however, did *not* cite any federal cases or constitutional provisions in support of his request for review of the trial court's jury instructions, despite the fact that he expressly invoked "the state and federal constitutions" while framing the second issue that his petition for review presented to the Arizona Supreme Court.[6] Resp. App. 25a.

On February 10, 2009, the Arizona Supreme Court denied review summarily and without comment. Resp. App. 29a.

On March 24, 2009, Petitioner filed with the Arizona Supreme Court a "Motion for Reconsideration of Denial of Review." Resp. App. 30a-33a. For the first time ever, Petitioner challenged the constitutionality of the child-molestation statute:

> The child molestation statute violates due process because it relieves the state from proving every element of the charged crime beyond a reasonable doubt. First, the statute does this by making too many everyday and innocent acts fall

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[6] In his petition for review, Petitioner prefaced the second issue as follows: "Under the state and federal constitutions, a defendant is guaranteed a trial by a fair and impartial jury, including a jury free from taint by outside sources." Resp. App. 25a.

> within its definition of child molestation. Second, although the legislature has broad authority to define the elements of a crime, it may not lower the state's burden of proof by calling an "element" something else.

Resp. App. 32a (citing *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000)).

In concert with Petitioner, the Arizona Attorneys for Criminal Justice ("AACJ") lodged with the Arizona Supreme Court a simultaneously-filed motion for leave to appear as *Amicus Curiae*, to which AACJ's attorneys attached a proposed *amicus* brief, which raised the arguments presented in the pending petition for certiorari. Pet. App. 25-26; Resp. App. 30a-32a. The State opposed all of these motions and also moved the Arizona Supreme Court to strike the *amicus* brief. Pet. App. 25.

On March 27, 2009, the Arizona Supreme Court summarily denied Petitioner's motion for reconsideration and AACJ's request for leave to appear as *amicus curiae*. *Id.* The Court therefore deemed the State's motion to strike as "moot." *Id.*

In recapitulation, Petitioner's sole contention in state court—until his untimely motion for reconsideration of the Arizona Supreme Court's denial of review—was that the trial court's jury instructions conflicted with the Arizona Legislature's true intention to require the State to bear the burden of proof regarding his sexual interest. While advancing this statutory-construction argument before all three tiers of the state judiciary, Petitioner not only eschewed attacking the constitutionality of Arizona's molestation statutes, he *expressly relied upon* the very statutes challenged here to buttress his position that the lower courts had

misidentified the defendant as the party to whom the Arizona Legislature had actually intended to assign the burden of proof regarding his sexual motivation. Pet. App. 38-39, 41-42; Resp. App. 2a-4a, 10a-16a, 19a- 21a, 23a-24a, 26a-28a.

REASONS FOR DENYING THE WRIT

Petitioner's Fourteenth Amendment Due Process challenge to Arizona's child-molestation statutes was neither addressed by, nor properly presented to, the Arizona Court of Appeals. Consequently, this Court lacks jurisdiction to grant the requested writ under 28 U.S.C. § 1257(a). Alternatively, this Court, as one of final review and not of first view, should deny the writ because granting review would render this Court the first to consider the constitutionality of Arizona's child-molestation laws, despite the hallowed principle of federal-state comity. Moreover, Petitioner's reliance on this Court's Sixth Amendment jury-trial jurisprudence is inapposite. Finally, granting a writ in this case will not resolve the particular conflict identified in the pending petition because the cases cited by Petitioner involve differently-worded statutory definitions and do not address the precise federal due process claim that Petitioner raises in his pending petition.

I. PETITIONER DID NOT PROPERLY RAISE HIS CONSTITUTIONAL CHALLENGE TO ARIZONA'S CHILD-MOLESTATION STATUTES IN STATE COURTS.

First, this Court simply lacks jurisdiction under 28 U.S.C. § 1257(a) to grant the requested writ of certiorari because Petitioner's Fourteenth Amendment Due Process challenge to Arizona's child-molestation statutes was neither pressed nor passed upon by the Arizona Court of Appeals. "Under that statute and its predecessors, this Court has almost

unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim 'was either addressed by or properly presented to the state court that had rendered the decision [it] ha[s] been asked to review.'" *Howell v. Mississippi*, 543 U.S. 440, 443 (2005) (quoting *Adams v. Robertson*, 520 U.S. 83, 86 (1997), and citing *Illinois v. Gates*, 462 U.S. 213, 218 (1983)). *Accord Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) (collecting cases). Based on this jurisdictional deficiency alone, this Court should decline review.

Lack of jurisdiction aside, the requested writ should be denied because granting review would render this Court the very first to address Petitioner's belated constitutional challenge to A.R.S. §§ 13–1410 and –1407(E), a posture that would contradict this Court's most recent and increasingly frequent explanations for refusing to address issues not decided by any lower court: "[t]his Court . . . is one of final review, 'not of first view.'" *FCC v. Fox Television Stations, Inc.*, 129 S.Ct. 1800, 1819 (2009) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005)). *Accord Montejo v. Louisiana*, 129 S.Ct. 2079, 2092 (2009) (same); *Pacific Bell Tel. Co. v. Linkline Communications, Inc.*, 129 S.Ct. 1109, 1123 (2009) (same). Indeed, "it is the settled practice of this Court, in the exercise of its appellate jurisdiction, that in only exceptional cases, and then only in cases coming from federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below." *Kentucky v. Stincer*, 482 U.S. 730, 747 n.22 (1987) (quoting *McGoldrick v. Compagnie Generale Atlantique*, 309 U.S. 430, 434 (1940)).

The principle of federal-state comity further compels the conclusion that Petitioner should not be permitted to challenge the state-court judgment against him with a new claim that he *never* presented properly to the state judiciary

first.[7] "Under our federal system, the federal and state courts are equally bound to guard and protect rights secured by the Constitution." *Rose v. Lundy*, 455 U.S. 509, 518 (1982) (quoting *Ex parte Royall*, 117 U.S. 241, 251 (1886)). "Comity . . . dictates that when a prisoner alleges that his continued confinement for a state court conviction violates federal law, the state courts should have the first opportunity to review this claim and provide any necessary relief." *Williams v. Taylor*, 529 U.S. 420, 437 (2000) (quoting *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999)). Thus, this Court should decline Petitioner's invitation to consider the federal constitutional question that he never properly presented to Arizona's courts, for "'it would be unseemly in our dual system of government' to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider." *Adams*, 520 U.S. at 90 (quoting *Webb v. Webb*, 451 U.S. 493, 500 (1981) (quoting *Picard v. Connor*, 404 U.S. 270, 275 (1971)). *Accord Bankers Life & Casualty Co.*, 486 U.S. at 79 (same).

The doctrine of state-federal comity applies with its greatest force in this case because Petitioner seeks certiorari to invalidate Arizona's child-molestation statutes on a federal constitutional ground never properly raised in state court. "Apart from the reluctance with which every court should proceed to set aside legislation as unconstitutional on grounds not properly presented, due regard for the appropriate relationship of this Court to state courts requires

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[7] *See Campbell v. Louisiana*, 523 U.S. 392, 403 (1998) ("With 'very rare exceptions' . . . we will not consider a petitioner's federal claim unless it was either addressed by or properly presented to the state court that rendered the decision that we have been asked to review.") (quoting *Adams*, 520 U.S. at 86); *Clark v. Jeter*, 486 U.S. 456, 458 (1988) ("It is our practice, when reviewing decisions by state courts, not to decide federal claims that were not 'pressed or passed upon below.'") (quoting *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 79-80 (1988)).

[it] to decline to consider and decide questions affecting the validity of state statutes not urged or considered there." *McGoldrick*, 309 U.S. at 434. *See also Monks v. New Jersey*, 398 U.S. 71 (1970); *Slagle v. Ohio*, 366 U.S. 259, 264 (1961). By failing to properly present his federal due-process challenge to Arizona's molestation statutes to the state courts, Petitioner frustrated the following important policies underlying the doctrine of federal-state comity:

> (1) Giving state courts the opportunity to address federal claims by implementing "a number of less intrusive, and possibly, more appropriate, resolutions," *Bankers Life & Casualty Co.*, 486 U.S. at 79-80, including resorting to "independent and adequate state grounds that would pretermit the federal issue." *Webb*, 451 U.S. at 500. *See also Adams*, 520 U.S. at 90; *Gates*, 462 U.S. at 222.
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> (2) Allowing "state courts to exercise their authority, which federal courts, including this [Court], do not have to the same extent, to construe state statutes so as to avoid or obviate federal constitutional challenges." *Webb*, 451 U.S. at 500. *See also Cardinale*, 394 U.S. at 439.
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> (3) Affording state courts the opportunity to address a federal claim's merits in a reasoned opinion, the generation of which would beneficially expound the state-law provisions at issue and create an adequate legal record that would obviate the need for this Court to engage in labor-intensive plenary review. *See Adams*, 520 U.S. at 91; *Bankers Life & Casualty Co.*, 486 U.S. at 79-80; *Webb*, 451 U.S. at 500-01.

Because the Arizona Court of Appeals' memorandum decision was silent on the constitutionality of Arizona's child-molestation statutes under the Fourteenth Amendment's Due Process Clause, longstanding precedent requires Petitioner to overcome the presumption that the state court's failure to address this federal question was attributable to his own failure to present it in timely, procedurally proper fashion.[8] This burden Petitioner cannot carry.

Petitioner's motion for reconsideration of the Arizona Supreme Court's order denying review constituted the sole time in state court that he ever explicitly argued that Arizona's child molestation statutes violated due process by relieving the state of its burden to prove every element of this crime beyond a reasonable doubt. Resp. App. 32a. Petitioner's motion for reconsideration, however, did not properly present this federal question to the Arizona judiciary.

First, the Arizona Supreme Court has deemed waived claims that the defendant failed to first raise in the lower courts. *See State v. Sepahi*, 78 P.3d 732, 735, ¶ 19 n.3 (Ariz. 2003) ("This issue was not raised either in the superior court or the court of appeals, and therefore was not preserved for our review."); *State v. Tankersley*, 956 P.2d 486, 498, ¶ 48 (Ariz. 1998) ("Because he did not assert this argument in the

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[8] *See Adams*, 520 U.S. at 86-87 ("When 'the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.'") (quoting *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 547, 550 (1987)); *Charleston Federal Savings & Loan Ass'n v. Alderson*, 324 U.S. 182, 185 (1945) ("It is essential to our jurisdiction on appeal under [§ 1257's predecessor statute] that there be explicit and timely insistence in the state courts, as applied, is repugnant to the federal Constitution, treaties, or laws.").

trial court, however, the issue is waived."); *State v. Spreitz*, 945 P.2d 1260, 1276 (Ariz. 1997) (finding defendant's due-process claim not raised below to be waived).[9]

Moreover, Petitioner's motion for reconsideration did not fairly present the pending due-process challenge to the state courts because he raised this claim, for the first time ever, before the Arizona Supreme Court, a court of a discretionary review in non-capital cases. *See Castille v. Peoples*, 489 U.S. 346, 351 (1989) (holding that the submission of a new claim to a State's highest court on discretionary review does not constitute fair presentation); *Swoopes v. Sublett*, 196 F.3d 1008, 1009-10 (C.A.9 1999) (collecting Arizona cases, statutes, and constitutional provisions showing that the Arizona Supreme Court has discretionary review in all but life-sentence or capital cases); *State v. Whipple*, 866 P.2d 1358, 1360 (Ariz. App. 1993) (acknowledging that the Arizona Supreme Court has discretionary-review powers in non-capital cases).

Furthermore, the Arizona Supreme Court denied this motion for reconsideration of its denial of review without comment. "The long-established general rule is that the attempt, to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it." *Herndon v. State of Georgia*, 295 U.S. 441, 443 (1935) (collecting cases). *See also Adams*, 520 U.S. at 89 n.3 (collecting cases).[10] Indeed, in the analogous post-conviction review

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[9] Respondents shall demonstrate below that Petitioner did not challenge Arizona's molestation statutes in the lower courts.

[10] Besides suffering from the same infirmities as Petitioner's untimely motion for reconsideration, the AACJ's simultaneously-filed *amicus curiae* brief did not adequately present the Arizona Supreme Court with the pending Fourteenth Amendment challenge because:

context, this Court recently recognized, "Under Arizona law, a defendant cannot raise new claims in a motion for rehearing." *Landrigan v. Schriro*, 550 U.S. 465, 478 n.3 (2007) (concluding that state prisoner's motion for rehearing failed to present the new claim to Arizona's courts).

To avoid preclusion of any constitutional challenge to Arizona's molestation statutes, Arizona law required Petitioner to file a motion no later than 20 days before his trial. *See* Ariz. R. Crim. P. 16.1(b); *State v. Montano*, 65 P.3d 61, 67, ¶¶ 17-18 (Ariz. 2003) (rejecting an untimely motion to dismiss on Sixth Amendment pretrial delay grounds and approvingly citing *State v. Mercado-Torres*, 955 P.2d 35, 37 (App. Ariz. 1997), which upheld the trial court's denial of a defendant's untimely day-of-trial oral motion to dismiss a weapons charge on the basis that the underlying statute was unconstitutional). Instead, Petitioner's sole argument—both during and after trial—was that the court's child-molestation jury instructions misstated Arizona law because lack of sexual motivation was no longer an affirmative defense as a result of recent legislation, Senate Bill 1145. Pet. App. 38-39, 41-43; Resp. App. 2a-4a. Indeed, Petitioner's trial counsel *never* argued that the jury instructions to which he took objection violated the Fourteenth Amendment's Due Process Clause. Pet. App. 38-40, 42-43; Resp. App. 2a-4a.

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(1) Arizona courts do not address new issues raised by the *amicus curiae*, but not the parties, *see City of Tempe v. Prudential Ins. Co.*, 510 P.2d 745, 748 (Ariz. 1973); *Yollen v. City of Glendale*, 191 P.3d 1040, 1051, ¶ 39 n.39 (Ariz. App. 2008); (2) the Arizona Supreme Court denied AACJ's motion for leave to appear as *amicus curiae*, which was filed without the State's foreknowledge, *see* Ariz. R. Crim. P. 31.25(a) (requiring either consent of opposing party or leave of the court to appear as *amicus curiae* in a case); and (3) AACJ filed its motion after the Arizona Supreme Court *denied* review, while Rule 31.25(b) provides that *amicus* briefs are to be filed after the supreme court *grants* review. Resp. App. 36a-37a.

Because Petitioner failed to raise a federal due-process challenge to A.R.S. §§ 13–1410 (A) and –1407(E) before the trial court, he effectively waived on direct appeal the very constitutional claim he now presents to this Court. *See State v. Schwartz*, 935 P.2d 891, 898 (Ariz. App. 1996) (finding waived constitutional challenge to statute not raised below); *State v. Helffrich*, 846 P.2d 151, 153 n.3 (Ariz. App. 1992) (same); *State v. Takacs*, 819 P.2d 878, 985 (Ariz. App. 1991) (same).[11] Nor did Petitioner challenge Arizona's child-molestation statutes as unconstitutional on *any* basis in the opening and reply briefs that he filed with the Arizona Court of Appeals, and when he subsequently petitioned the Arizona Supreme Court to review the court of appeals' memorandum decision. Resp. App. 10a-16a, 19a-28a. Indeed, Petitioner's sole citation to federal constitutional law in state court—made in the seventy-ninth footnote of his opening brief without accompanying argument—gave the Arizona Court of Appeals no reason to construe Petitioner's argument as extending beyond whether the trial court's jury instructions correctly stated Arizona law. Resp. App. 15a, n.79 (citing *In re Winship*, 397 U.S. at 364; and U.S. Const. Amends. 5, 14.)

Besides the court of appeals' silence regarding the constitutionality of Arizona's child molestation laws, the following facts demonstrate that Petitioner's unexplicated citation to *Winship* did not squarely present the constitutional claim presented in his petition for a writ of certiorari.

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[11] *Cf. State v. Trostle*, 951 P.2d 869, 878 (Ariz. 1997) (pre-trial publicity not raised below was forfeited); *State v. Tison*, 633 P.2d 335, 344 (Ariz. 1981) ("The preclusion of issues applies to constitutional objections as well as statutory objections because an adherence to procedural rules serves a legitimate state interest in the timely and efficient presentation of issues."); *State v. Ramsey*, 124 P.3d 756, 766, ¶ 30 n.6 (Ariz. App. 2005) (defendant waived due-process claim not raised below); *State v. McKinley*, 755 P.2d 440, 443 (Ariz. App. 1988) (defendant waived Confrontation Clause claim not raised at trial).

First, *Winship* did not confront a claim that the state legislature had engaged in unconstitutional burden-shifting, but instead answered in the affirmative "the single, narrow question whether proof beyond a reasonable doubt is 'among the essentials of due process and fair treatment' required during the adjudicatory stage when a juvenile is charged with an act which would constitute a crime if committed by an adult." 397 U.S. at 360 (quoting *In re Gault*, 387 U.S. 1, 30 (1967)). If Petitioner had wished to argue that the 1993 amendments to A.R.S. § 13–1410 (A) unconstitutionally shifted to him the burden of proving the *mens rea* element of child-molestation, he should have made such intention clear to the Arizona Court of Appeal by citing post-*Winship* cases that directly raised that type of claim, such as *Patterson v. New York*, 432 U.S. 197 (1977), and *Mullaney v. Wilbur*, 421 U.S. 684 (1975). Indeed, Petitioner's unexplicated citation to *Winship*, which predates the authorities he cites now before this Court, would not even satisfy the exhaustion requirement governing the closely analogous context of federal habeas review. *See McNair v. Campbell*, 416 F.3d 1291, 1303 (C.A.11 2005) ("The exhaustion doctrine requires a habeas applicant to do more than scatter some makeshift needles in the haystack of the state court record."); *Mallory v. Smith*, 27 F.3d 991, 995 (C.A.4 1994) ("The ground relied upon must be presented face-up and squarely; the federal question must be plainly defined. Oblique references which hint that a theory may be lurking in the woodwork will not turn the trick.") (quoting *Martens v. Shannon*, 836 F.2d 715, 717 (C.A.1 1988)). *Cf. United States v. Dunkel*, 927 F.2d 955, 956 (C.A.7 1991) ("Judges are not like pigs, hunting for truffles buried in briefs.").

Furthermore, the context of Petitioner's citation to *Winship* in his opening brief likewise gave the Arizona Court of Appeals no reason to discern a federal constitutional

challenge to A.R.S. § 13–1410 (A).[12] At the outset, Petitioner framed the issue on appeal as whether he was "entitled to a new trial when *the trial judge* placed the burden on him to prove a lack of sexual motivation." Resp. App. 12a (emphasis added). Petitioner prefaced his "legal discussion" by forewarning the court of appeals, "The jury instructions in issue lead us to wade in the murky waters of the difference between an affirmative defense and a legal defense. The difference is critical as it defines who bears the burden of proof." *Id.* Petitioner thereafter relied upon three state-law sources that he claimed illuminated the Arizona Legislature's intent to make "lack of sexual motivation" a "legal defense" negating an element of child molestation, instead of an "affirmative defense" that A.R.S. § 13–205 (A) required him to prove by a preponderance of the evidence: (1) the statutory definition of "affirmative defense" set forth in A.R.S. § 13–103 (B); (2) Arizona precedent identifying motivation by sexual interest as an element of prior versions of Arizona's child-molestation statute; and (3) the nomenclature used in the title of A.R.S. § 13–1407. Resp. App. 12a-15a. Only after concluding that lack of sexual motivation was not an affirmative defense under Arizona law did Petitioner cite

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[12] Arizona courts have no duty to raise issues not raised by the defendant in criminal cases. *See, e.g., State v. Jones*, 4 P.3d 345, 357, ¶ 22 (2000) ("No court has held that the constitutional burden to meet the Sixth Amendment's Confrontation Clause shifts to the trial court in the absence of the defense counsel's motion or request to grant such immunity."); *State v. Johnson*, 570 P.2d 503, 505 (Ariz. App. 1977) (holding that the trial court "is not obligated . . . to raise and adjudicate *sua sponte* an insanity defense of a competent defendant based on the theory of the defendant's insanity at the time of the crime"); *State v. Lee*, 542 P.2d 413, 417 (Ariz. 1975) (holding that Arizona Rule of Criminal Procedure 8.6 does not require the trial court "to search out possible time violations on its own initiative" and reasoning that it is "unreasonable to require reversal when the trial court does not perform a function which properly belongs to defendant's counsel").

Winship for the unremarkable proposition that the State must prove all elements of child molestation beyond a reasonable doubt:

> This brings us to the key question: what difference does the distinction [between affirmative and legal defenses] make? A big one. A.R.S. § 13–205, applying as it does to only affirmative defenses, did not shift the burden of proof, by a preponderance or otherwise, to the defendant.
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> This means that we are left with the cherished principle and constitutional due process right, imposing upon the state the burden to establish each element of the offense beyond a reasonable doubt. [FN 79: *In re Winship*, 397 U.S. 358, 364 (1970); U.S. Const. Amendments 5, 14; Ariz. Const. Art. 2, § 4.]
>
> This was not done in this case. Not only was the burden on the wrong party, it was the wrong standard.

Resp. App. 15a. Significantly, Petitioner's opening brief—like his subsequent reply brief and petition for review—did *not* alternatively contend that the Fourteenth Amendment's Due Process Clause would invalidate A.R.S. § 13–1410 (A) if the court of appeals reached the opposite conclusion that the Arizona Legislature had intended to establish "lack of sexual motivation" as an affirmative defense instead.

Given the fact that Petitioner's challenge to the jury instruction rested exclusively upon his claim that the trial court misconstrued the legislative intent underlying A.R.S. §§ 13–103(B), –1410(A), and –1407(E), the Arizona Court of Appeals had no reason to understand Petitioner's citation

to *Winship* as raising the unrelated and broader federal claim that these very statutes collectively violated due process. *See Adams*, 520 U.S. at 88-89 (holding that petitioners never properly presented the Alabama Supreme Court "the broader federal claim" that "minimum due process requires Class Members be given the right to opt out or exclude themselves from the class," where the petitioners cited *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), for an entirely different argument, and their ensuing discussion addressed only the narrower question of whether non-resident class members were afforded due process); *Jeter*, 486 U.S. at 459-60 (holding that petitioner's federal preemption challenge to Pennsylvania's former 6-year statute of limitations for paternity suits was neither pressed nor passed upon below, where the litigation in state court centered upon whether the Pennsylvania Legislature had intended to give retroactive effect to its new state statute complying with Congress' 18-year statute of limitations); *Alderson*, 324 U.S. at 186 (finding no jurisdiction to review constitutionality of statute where "it does not appear from the opinion of the state court of appeals that the federal question was presented to or considered by that court" [because] "[w]hile the opinion intimates that appellants' objection was made to the administration of the statute, it nowhere indicates that they contended that, as applied, the statute was invalid as repugnant to the federal Constitution").

Nor may Petitioner argue that his pending federal constitutional challenge to Arizona's child-molestation statutes was "pressed or passed upon" by the Arizona Court of Appeals because his opening brief cited *Winship* and the Fourteenth Amendment's Due Process Clause for the *different* proposition that the State must prove all elements of child molestation beyond a reasonable doubt. This Court's own precedent conclusively demonstrates that a party's presentation of one type of a federal-due process claim in

state court does *not* render every other conceivable due-process argument properly presented to the state judiciary. *See Clark v. Arizona*, 548 U.S. 735, 764-65 (2006) (declining to review a due-process challenge to trial court's possible restriction of observation evidence that "was neither pressed nor passed upon in the Arizona Court of Appeals," despite addressing the merits of other due-process arguments that petitioner properly presented to the state courts); *Gray v. Netherland*, 518 U.S. 152, 162-65 (1996) (recognizing that the habeas petitioner's brief had presented two "separate" due-process claims with "two particular analyses," one governing the petitioner's "notice of evidence" claim, and the other his "misrepresentation of evidence" claim); *Anderson v. Harless*, 459 U.S. 4, 7 (1982) (holding that habeas petitioner's citation to a Michigan case holding that the defendant had "a broad federal due process right to jury instructions that properly explain state law" in his appellate briefing before the Michigan Court of Appeals failed to exhaust the different due-process claim that the jury instruction relieved the prosecution of proving every element of the crime under "the more particular analysis developed in cases such as *Sandstrom* [*v. Montana*, 442 U.S. 510 (1979)]").

The foregoing conclusively demonstrates that Petitioner is seeking a writ of certiorari, based upon arguments that he never properly presented to the state courts. This Court, however, has repeatedly declined similar invitations to entertain "new substantive arguments attacking, rather than defending, the judgment when those arguments were not pressed in the court whose opinion we are reviewing, or at least passed upon by it." *United States v. United Foods, Inc.*, 533 U.S. 405, 416-17 (2001) (citing *Lopez v. Davis*, 531 U.S. 230, 244, n.6 (2001)). *Accord Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 n.3 (1999); *National Collegiate Athletic Ass'n v. Smith*,

525 U.S. 459, 469-70 (1999). Because the constitutional validity of Arizona's child-molestation statutes is a matter of great importance, this Court should honor the Arizona judiciary's place in our federal system by denying certiorari and granting Arizona courts the first opportunity to assess the constitutionality of its child-molestation statute in the first instance.[13] *See Bankers Life & Casualty Co.*, 486 U.S. at 79; *Gates*, 462 U.S. at 224.

II. THE CONFLICT THAT PETITIONER CLAIMS TO EXIST AMONG LOWER COURTS IS ILLUSORY AND INAPPOSITE TO A.R.S. § 13-1410(A).

Although Petitioner contends that the granting of certiorari in the instant case would resolve a conflict among several state courts regarding the ability of legislatures to "tamper with the prosecution's burden of proof in child molestation cases," this argument has two flaws: (1) the statutes at issue in the cases that Petitioner has cited contain language not found in Arizona's child-molestation laws; and (2) none of these cases address the question presented in this petition for writ of certiorari—whether the Arizona Legislature violated the Fourteenth Amendment's Due Process Clause by amending its child-molestation statutes to require the defendant to prove as an affirmative defense, "lack of sexual motivation," a fact the converse of which had formerly constituted an element of the crime, "motivation by sexual interest."

First, granting review in this case would not resolve any conflict among lower courts because the statutory definition of "sexual contact" in Arizona substantially differs from the

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[13] Indeed, as of the time of the filing of this brief in opposition, Arizona courts have *not* published any opinions addressing the constitutionality of A.R.S. § 13-1410.

definitions employed in the jurisdictions that generated the opinions cited by Petitioner. All of these cited cases present various legal questions stemming from variations of the phrase, "can [or could] be reasonably construed as being for the purpose of sexual arousal or gratification," included in the statutory definitions of "sexual contact" codified by the legislatures of Colorado, Michigan, Minnesota, Nebraska, Wisconsin, and Wyoming.[14] Arizona, however, defines "sexual contact" as "any direct or indirect touching, fondling or manipulating of any part of the genitals, anus or female breast by any part of the body or by any object or causing a person to engage in such contact." A.R.S. § 13–1401.2.

Furthermore, none of Petitioner's cited cases involve a challenge to the constitutionality of a state child-molestation

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[14] *See People v. West*, 724 P.2d 623, 627 (Colo. 1986) (statutorily defining "sexual contact" as "intentional acts" that "can reasonably be construed as being for the purposes of sexual arousal, gratification, or abuse") (quoting Colo. Rev. Stat. § 18–3–401(3) (1978)); *People v. Piper*, 567 N.W.2d 483, 485 (Mich. App. 1997) (statutory definition of "sexual contact" requires proof of "intentional touching [that] can be reasonably construed for the purpose of sexual arousal or gratification") (quoting Mich. Comp. Laws. Ann. § 750.520c); *State v. Tibbetts*, 281 N.W.2d 499, 500-01 (Minn. 1979) (statutorily defining "sexual contact" as acts that "can reasonably be construed as being for the purpose of satisfying the actor's sexual or aggressive impulses") (quoting Minn. Stat. Ann § 609.341.11); *State v. Osborn*, 490 N.W.2d 160, 167 (Neb. 1992) (defining "sexual contact" as including "only such conduct which can be reasonably construed as being for the purpose of sexual arousal or gratification of either party") (quoting Neb. Rev. Stat. § 28–318(5)); *State v. Nye*, 302 N.W.2d 83, 84-85 (Wis. App. 1981) (statutory definition of "sexual contact" requires proof of "intentional touching [that] can be reasonably construed for the purpose of sexual arousal or gratification") (quoting Wis. Stat. Ann. § 940.20), *aff'd*, 312 N.W.2d 826 (Wis. 1981); *Bryan v. State*, 745 P.2d 905, 908 (Wyo. 1987) (defining "sexual intrusion" as requiring proof that the intrusion "can reasonably be construed as being for the purposes of sexual arousal, gratification or abuse") (quoting Wyo. Stat. Ann. § 6–2–301(a)(vii)(A)).

statute on the ground that legislative amendments shifted to the defendant the burden of disproving the existence of a fact that had originally been an element of that crime. Instead, Petitioner's cited cases resolved the following inapposite legal issues: (1) whether the state's statutory definition of "sexual contact" was void on vagueness grounds, *see West*, 724 P.2d at 624-27; *Piper*, 567 N.W.2d at 645-47; (2) whether the jury instructions on child-molestation "obscured and diluted" the reasonable-doubt standard by allowing convictions based upon a finding that the defendant's touching "could reasonably be construed as being for the purpose of" satisfying the defendant's sexual gratification, *see Tibbetts*, 281 N.W.2d at 500-01; *Nye*, 302 N.W.2d at 84-87; (3) whether the defendant gave an adequate factual basis to support his guilty pleas to sexual crimes *other than* child molestation, *see Osborn*, 490 N.W.2d at 166-68 (sexual assault); *Bryan*, 745 P.2d at 908-09 (first-degree sexual assault). Thus, these cases likewise fail to demonstrate the existence of a lower-court conflict that this Court could resolve by granting a writ for certiorari in this case.

III. PETITIONER'S RELIANCE ON *APPRENDI* AND ITS PROGENY IS MISPLACED.

Relying upon this Court's recent jurisprudence construing the Sixth Amendment's jury-trial guarantee, Petitioner analogizes the fact of "motivation by sexual interest" to a "functional equivalent of an element" of the crime of child molestation in Arizona. Building upon this analogy, Petitioner maintains that the Arizona Legislature's revisions to the statutory text of A.R.S. § 13–1410(A)—which effectively transformed the "lack of sexual motivation" defense in A.R.S. § 13–1407(E) into an "affirmative defense" that the defendant must prove by a preponderance of the evidence—impermissibly relabeled the "sexual motivation" element as an affirmative defense and

consequently violated his Sixth Amendment right to have a jury find this "functional equivalent of an element" of child molestation proven beyond a reasonable doubt. Petitioner's reliance on *Apprendi* and its progeny, however, is misplaced because he misconstrues the true definition of the term "functional equivalent of an element" and fails to recognize that this Court's recent Sixth-Amendment opinions focused upon vindicating constitutional guarantees not at issue here.

In *Apprendi*, this Court observed that during this Nation's founding years, "[t]he substantive criminal law tended to be sanction-specific," and thus both the indictment and the jury verdict necessarily reflected all of the facts necessary to impose the punishment prescribed for he charged offense. 530 U.S. at 478-81. "The mid-19th century produced a general shift in this country from criminal statutes 'providing fixed term sentences to those providing judges discretion within a permissible range.'" *Harris v. United States*, 536 U.S. 545, 558 (2002) (quoting *Apprendi*, 530 U.S. at 481). This new trend in American sentencing laws created a "distinction between an 'element' and a 'sentencing factor' [that] was unknown . . . during the years surrounding our Nation's founding," and ultimately led some legislatures to enact statutory schemes that effectively obliterated "the historical link between verdict and judgment and the constitutional limitation on judges' discretion to operate within the limits of the legal penalties provided" by "remov[ing] the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone." *Apprendi*, 530 U.S. at 482-83 (emphasis in original). To invalidate sentencing statutes that sanctioned the imposition of sentences exceeding the maximum authorized by the jury's verdict, based upon judicially-found facts, this Court held that the Sixth Amendment's jury-trial guarantee requires that,

"[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proven beyond a reasonable doubt." *Blakely v. Washington*, 542 U.S. 296, 301 (2004) (quoting *Apprendi*, 530 U.S. at 490). *Accord Cunningham v. California*, 549 U.S. 270, 282 (2007); *Harris*, 536 U.S. at 563.

The rationale underlying these cases is that any fact that increases the defendant's punishment above the maximum prescribed for his crime of conviction, regardless of their statutory label, constitutes the "functional equivalent of an element of *a greater offense*," *Ring v. Arizona*, 536 U.S. 584, 609 (2002) (quoting *Apprendi*, 530 U.S. at 494 n.19) (emphasis added), which a jury must find beyond a reasonable doubt:

> Those facts, *Apprendi* held, were what the Framers had in mind when they spoke of "crimes" and "criminal prosecutions" in the Fifth and Sixth Amendments: A crime was not alleged, and a criminal prosecution not complete, unless the indictment and the jury verdict included all the facts to which the legislature had attached the maximum punishment. Any "fact that ... exposes the criminal defendant to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone," the Court concluded, *id.*, at 483, 120 S.Ct. 2348, would have been, under the prevailing historical practice, an element of *an aggravated offense*.

Harris, 536 U.S. at 563 (emphasis added). *See also Ring*, 536 U.S. at 605 ("When the term 'sentence enhancement' is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional quivalent of an element

of *a greater offense* than the one covered by the jury's guilty verdict.") (quoting *Apprendi*, 530 U.S. at 494 n.19) (emphasis added); *Harris*, 536 U.S. at 557 ("*Apprendi* said that any fact extending the defendant's sentence beyond the maximum authorized by the jury's verdict would have been considered an element of *an aggravated crime*—and thus the domain of the jury—by those who framed the bill of rights.") (emphasis added); *Apprendi*, 530 U.S. at 501 (Thomas, J., concurring) ("[I]f the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact[,] ... *the core crime and the aggravating fact together constitute an aggravated crime*, just as much as grand larceny is an aggravated form of petit larceny. *The aggravating fact is an element of the aggravated crime*.") (emphasis added).

Hence, Petitioner's argument that "sexual motivation" is the "functional equivalent of an element" of child molestation is incorrect because: (1) the Arizona Legislature did *not* authorize increasing Petitioner's sentence above the maximum penalty prescribed for violations of A.R.S. § 13–1410, based upon a *judicial* finding of his sexual motivation; and (2) this "functional equivalent of an element" term refers only to those facts that, if found, have the effect of exposing the defendant to a greater punishment than that authorized by the jury's guilty verdict and effectively serve as an element that distinguishes the crime of conviction from an aggravated offense. *See Ring*, 536 U.S. at 609 (finding that "Arizona's enumerated aggravating circumstances operate as 'the functional equivalent of a greater offense'") (quoting *Apprendi*, 530 U.S. at 494 n.19). Stated differently, *Apprendi* is inapplicable because Petitioner's sentences were based exclusively upon those facts that were alleged in the indictment and found by the jury beyond a reasonable doubt, and none that could be deemed "the functional equivalent of an element" of a *greater* offense.

"Thus, while we may label a fact as the 'functional equivalent of an element' for purposes of *Apprendi*, that does not transform the fact into an offense "element" for purposes of *Winship*." *United States v. Toliver*, 351 F.3d 423, 430 (C.A.9 2003). "It is clear, therefore, that *Apprendi's* prohibition on re-labeling facts that could be treated as elements as something else applies solely to sentence enhancement provisions that increase the range of punishment beyond that authorized by the jury's verdict, and did not overrule the conclusion in *Patterson* that the states constitutionally may 'reallocate burdens of proof by labeling as affirmative defenses at least some elements of the crimes now defined in their statutes.'" *State v. Ray*, 966 A.2d 148, 161 n.15 (Conn. 2009) (quoting *Patterson*, 432 U.S. at 210).

CONCLUSION

For these reasons, the State respectfully requests that this Court deny Petitioner's petition for writ of certiorari.

Respectfully submitted

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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

STATE OF ARIZONA,	) No. CR2006-030290-001SE
	)
Plaintiff,	)
	)
-vs-	) **MOTION FOR NEW TRIAL**
	)
STEPHEN MAY	) (The Hon. Sherry Stephens)
	)
Defendant.	)
	)

Defendant, Stephen May, by and through counsel undersigned, hereby moves this Court for an Order granting a new trial pursuant to ***Rule 24.1*** **of the Arizona Rules of Criminal Procedure.** The grounds supporting this motion are that the verdict is contrary to law or to the weight of the evidence; that the Court erred in the decision of a matter of law and in the instruction to the jury on a matter of law to the substantial prejudice of Defendant; and for reasons not due to the Defendant's own fault, he has not received a fair and impartial trial.

The verdict is contrary to law or the weight of the evidence:

Nothing in the evidence, either directly or inferentially, established that Stephen May was motivated by sexual interest in his dealings with these children. His testimony was specific and

uncontradicted that any "touching" that occurred was [2] unintended, accidental and devoid of sexual interest on his part. Further, no testimony or evidence established any peripheral conduct that would support a finding of such sexual interest. For example, no evidence of any conversation with the children at the time of the alleged touching or thereafter; no movement of his hand during the touching consistent with fondling or manipulating the children's genitals; all touching was described by the children as of short duration; no threats to the children not to tell anyone what occurred; in short, no indications of any sexual interest or intent was shown by Stephen was shown by any evidence. The weight of the evidence supports Stephen's testimony of innocent and incidental or accidental contact, and fails to support the jury's guilty verdicts.

Given the above, together with the jury's questions, the jury's verdict is not supported by the weight of evidence, but only by speculation of the jury.

The Court erred in a decision of a matter of law:

Following a hearing on Defendant's Motion to Sever, the Court declined to sever the unrelated allegation of Count 7 from the other counts of the indictment. As clearly shown by the jury's questions during its deliberations, it utilized evidence as to Count 7 to "corroborate" the allegations in the other counts, and utilized the allegations of the other counts to "corroborate" the allegation of Count 7. Because of the Court's error in failing to sever Count 7, evidence as to that count was misapplied to the finding of guilt. The Court also erred in failing to grant Defendant's motion for judgment of acquittal pursuant to Rule 20 at the end of the State's case.

The Court erred in the instruction of the jury on a matter of law to the substantial prejudice to Defendant.

Over objection, the Court gave erroneous instructions to the jury regarding [3] the burden of proof and the standard of proof required for their consideration regarding the defense of lack of sexual motivation or sexual interest. The defense is codified in *A.R.S. § 13-*

1407E and, pursuant to the most recent amendments to *A.R.S. § 13-103*, such a defense is not an "affirmative defense" requiring a defendant to prove the defense by "clear and convincing evidence."

Traditionally, affirmative defenses were always the defendant's burden of proof by a preponderance of the evidence. That situation changed substantially with the passage of Senate Bill 1145, an amendment to *A.R.S. § 13-103* and other Arizona statutes. The amendment above-referenced made a significant change in the definition of "affirmative defense." Previous to the amendment, "affirmative defense" was defined as "a defense that is offered and that attempts to ***justify*** the criminal actions of the accused." (Emphasis added). Following the amendment, that definition clearly was changed to mean a defense that attempts to **EXCUSE** the criminal actions of the accused. (Emphasis added). As a result of the amendment, an "affirmative defense" no longer includes a defense that "justifies" action otherwise criminal or "any defense that either denies an element of the offense charged or denies responsibility . . . or lack of intent."

Indirect touching of the genitals is justified during a playful interaction, such as in this case, if it is not motivated by sexual interest, even if undertaken intentionally. Here, Defendant acknowledged the possibility of unintended or accidental touching during play with the girls in the pool in Counts 1-4, and while assisting with computer skills in the classroom in Count 7. However, he was clear that not only was such contact unintended or accidental, it would have been without any motivation of sexual [4] interest. Because his conduct would have been justified under such circumstance, the amendment to *A.R.S. § 13-103* required that the State prove beyond a reasonable doubt that Defendant was motivated by sexual interest. The Court's instruction was in error, the jury was misled, and the Defendant was substantially prejudiced as a result.

The clearest indication of the level of prejudice to Defendant was the jury's chart on the wall of the deliberations room, which set forth the elements of the charged crimes as they understood the instructions to require. The last element they had written was "motivation of

sexual interest" following which they had written "Defendant must disprove" with the word "disprove" double underlined. The jury was mis-instructed to the point that they believed Defendant had the obligation to disprove that he was motivated by sexual interest.

Discussion:

For all of the reasons set forth in detail above, and for the reasons not due to his own fault, Stephen May did not receive a fair and impartial trial. This Court is urged to order a new trial so that he may receive that fair and impartial trial.

RESPECTFULLY SUBMITTED this 26th day of February, 2007.

PHILLIPS & ASSOCIATES

By /s Joel Erik Thompson
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Certified Specialist in Criminal Law
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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA,	) COURT OF APPEALS
	) DIVISION ONE
Plaintiff,	) No. 1 CA-CR07-0144
	)
vs.	) Superior Court
	) No. CR2006-030290-001SE
STEPHEN EDWARD MAY,	)
	)
Defendant.	)

Mesa, Arizona
FEBRUARY 16, 2007

BEFORE: THE HONORABLE SHERRY K. STEPHENS
Judge of the Superior Court

REPORTER'S TRANSCRIPT OF PROCEEDINGS
(Sentencing)

REPORTED BY:

Dana D. Smith
Cert. No. 50566
Official Court Reporter

Prepared for Appeal

[2] APPEARANCES

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JOHN BEATTY
Deputy County Attorney

For the Defendant:

JOEL THOMPSON
Attorney at Law

. . .

[6] THE COURT: The Court has reviewed the letters submitted by Daniel Antkiwicz.

All right. Before we proceed to sentencing, the Court will hear arguments on the motion for new trial. Court has reviewed the written motion submitted by defense counsel and the State's response to that motion.

Mr. Thompson, is there anything that you want to [7] say in support of your motion?

MR. THOMPSON: Your Honor, our position is set forth in the motion. I didn't find anything in the State's response that really altered the issues that I presented or specifically addressed anything to respond to it. I will stand on the content of the motion.

THE COURT: All right. Mr. Beatty, anything to put on the record?

MR. BEATTY: The State stands by its response as well.

THE COURT: All right. The Court is going to deny the motion. Most of the issues were discussed and resolved at trial. The Court finds there was sufficient evidence to support the verdicts.

All right. Let's proceed with sentencing. . . .

. . .
. . .

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	) No. 1CA-CR07-0144
	) Superior Court No. CR2006-030290
Appellee,	) -001SE
	)
v.	)
	)
Stephen Edward May,	)
	)
Appellant.	)
	)

Appellant's Opening Brief

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[iii] **Other**

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. . .

[1] **Statement of the Case**

. . .

[7] **B. Jury Instructions.**

The one debate over jury instructions centered on those regarding the defense to child molestation that the "defendant was not motivated by a sexual interest."[45] It was the position of the defense that the burden was on the state to [8] prove that the act was sexually motivated beyond a reasonable doubt.[46] The defense also argued[47] that the defense was not an affirmative defense, relying upon A.R.S. § 13-103.B, "'Affirmative defense' means a defense that is offered and that attempts to justify the criminal actions of the accused. . . . Affirmative defense does not include any defense that denies responsibility, including alibi, misidentification, or lack of intent."

The question of whether the defense was an affirmative one raised the issue of burden of proof: for an affirmative defense, the burden is placed on the defense, by a preponderance of the evidence. The rule is embodied in A.R.S. § 13-205.A, which the state cited,[48] "Except as otherwise provided by law, a defendant shall prove any affirmative defense raised by a preponderance of the evidence...." The prosecutor added, "I just wasn't aware that . . . molestation had acquired a new element, Judge. . . . It certainly is not in my statute book (that) there is a new element in that statute."[49]

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[45] A.R.S. § 13-1407.E.
[46] T. Jan. 9, 2007, at 70-73, T. Jan. 10, 2007, at 100.
[47] T. Jan. 10, 2007, at 100.
[48] T. Jan. 10, 2007, at 100.
[49] T. Jan. 9, 2007, at 73.

The judge concurred with the state, so that the instructions given the jurors at the close of the case were:

> The crime of molestation of a child requires proof that the defendant [9] knowingly touched, directly or indirectly, the genitals of a child under the age of 15, It's a defense to child molestation that the defendant was not motivated by sexual interest.
>
> The defendant has raised the affirmative defense of lack of sexual motivation with respect to the charged offenses of molestation of a child. The burden of proving each element of the offense beyond a reasonable doubt always remains on the state. However, the burden of proving the affirmative defense of lack of sexual motivation is on the defendant. The defendant must prove the affirmative defense of lack of sexual motivation by a preponderance of the evidence. If you find that the defendant has proved the affirmative defense of lack of sexual motivation by a preponderance of the evidence, you must find the defendant not guilty of the offense of molestation of a child.[50]

The defense re-urged the issue in its motion for new trial.[51] The judge again ruled in favor of the State.[52]

. . .

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[50] T. Jan, 2007, at 107-108.

[51] IR 241.

[52] IR 250 at 2.

[12] **Statement of Issues**

1. The crime of child molestation has, as an essential element and as specific intent, a requirement that the touching was motivated by sexual interest. The lack of sexual motivation is a defense. The burden is on the prosecution to prove the existence of sexual motivation beyond a reasonable doubt. Isn't the defendant entitled to a new trial when the trial judge placed the burden on him to prove lack of sexual motivation?

. . .

[13] **Argument**

A. The jury instructions unconstitutionally placed the burden of proof on the defendant.

1. Standard of review. The appellate courts review *de novo* whether jury instructions adequately state the law.[71]

2. Legal discussion. The jury instructions in issue lead us to wade in the murky waters of the difference between an affirmative defense and a legal defense. A.R.S. § 13–1407.E, upon which the instruction was in part based, sets forth a legal, rather than affirmative defense. The difference is critical, as it defines who bears the burden of proof.

In a different context, the Eleventh Circuit, in *United States v. Cameron*,[72] discussed the difference in these two classes of defenses. The Court addressed the debate of using psychiatric

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[71] *State v. Johnson*, 212 Ariz. 425, 431, ¶ 15, 133 P.3d 735, 741, *cert. denied*, --- U.S. ---, 127 S.Ct. 559 (2006).

[72] *United States v. Cameron*, 907 F.2d 1051, 1063 (11th Cir. 1990).

testimony for the affirmative defense of insanity, versus its use as a legal defense to negate a specific intent crime via diminished [14] capacity. While the topic may be different, the analysis is on point:

> [B]oth Congress and the courts have recognized the crucial distinction between evidence of psychological impairment that supports an "affirmative defense," and psychological evidence that negates an element of the offense charged. "Affirmative defense" evidence of mental impairment, when specifically recognized and defined by the legislature, must be raised by the defendant and can "justify" or "excuse" conduct that is otherwise criminal.[73]

The *Cameron* court then contrasted this with the definition of legal defense:

> Psychological evidence that aids the trier in determining the defendant's specific state of mind with regard to the actions she took at the time the charged offense was committed, by contrast, is not an affirmative defense but is evidence that goes specifically to whether the prosecution has carried its burden of proving each essential element of the crime-at least when specific intent is at issue.[74]

The state law analysis begins with A.R.S. § 13–1407.E. It provides a defendant may raise the defense that any touching of a child under the age of 15 was not sexually motivated. Case

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[73] *Cameron*, 907 F.2d at 1063.

[74] *Cameron*, 907 F.2d at 1063.

law explains that sexual motivation constitutes a specific intent component of the crime,[75] and is an essential element of it.[76] This [15] means that the statute meets the *Cameron* definition of a legal defense, rather than an affirmative one.

A.R.S. § 13–1407.E's plain language is consistent with this. The statute says that it is a "defense" to molestation that there is a lack of sexual motivation. It does not say it is an "affirmative defense." The word choice illuminates the legislature's intent.[77]

A.R.S. § 13–103.B, in the version applicable to this case,[78] only bolsters the defense argument. Its last sentence reads, "Affirmative defense does not include any defense that either denies an element of the offense charged or denies responsibility, including alibi, misidentification, or *lack of intent*." (Emphasis added.) The provision is, then, yet another illustration of the difference between a legal defense and an affirmative defense, and of the legislative intent. And, it demonstrates that once again, A.R.S. § 13-1407.E confers a legal defense. Its principle, if not its words, track the same distinction made by the *Cameron* court.

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[75] *State v. Turrentine*, 152 Ariz. 61, 67, 730 P.2d 238, 245 (App. 1986) ("evidence was sufficient for the jury to have found that appellant was motivated by an unnatural or abnormal sexual interest with respect to children and therefore is sufficient to support a finding of specific intent under A.R.S. § 13-1410").

[76] *State v. Brooks*, 120 Ariz. 458, 460, 586 P.2d 1270, 1272 (1978) ("An essential element of the offense of child molestation under § 13-653 is that the acts involved be motivated by an unnatural or abnormal sexual interest or intent with respect to children.")

[77] *State v. Dixon*, 216 Ariz. 18, 20, ¶ 7, 162 P.3d 657, 659, ¶ 7 (App. 2007).

[78] Amendments to A.R.S. § 13-103.B took effect April 24, 2006. *Garcia v. Browning*, 214 Ariz. 250, 254, ¶ 20, 151 P.3d 533, 537, ¶ 20 (2007)

This brings us to the key question: what difference does the distinction make? A big one. A.R.S. § 13–205, applying as it does to only affirmative defenses, did not shift the burden of proof, by a preponderance or otherwise, to the defendant.

[16] This means that we are left with the cherished principle and constitutional due process right, imposing upon the state the burden to establish each element of the offense beyond a reasonable doubt.[79]

This was not done in this case. Not only was the burden on the wrong party, it was the wrong standard.

The legal error is hardly harmless here. The allegations each concerned brief contact—which could have been accidental, particularly in light of Mr. May's neurological problems. The events occurred in settings where it was natural for Mr. May and the children to come into contact with each other. Mr. May never threatened the children or made sexual remarks to them. The state would have been hard pressed to meet its burden.

This most serious of legal errors entitles Mr. May to a new trial, with instruction to the jury that the state must prove sexual motivation beyond a reasonable doubt.

. . .

[32] **Conclusion**

The errors in this case entitle Mr. May to the following relief:

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[79] *In re Winship*, 397 U.S. 358, 364 (1970); U.S. Const. Amendments 5 and 14; Ariz. Const. Art. 2, § 4.

1. A new trial with instruction that the state must prove the presence of sexual motivation beyond a reasonable doubt.

[33]

RESPECTFULLY SUBMITTED this 11th day of October 2007.

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2008 WL 933139

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	) No. 1CA-CR07-0144
	) Superior Court No. CR2006-030290
Appellee,	) -001SE
	)
v.	)
	)
Stephen Edward May,	)
	)
Appellant.	)
	)

Appellant's Reply Brief

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State v. Logan, 200 Ariz. 564, 30 P.3d 631 (2001).....6
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State v. Simpson, 217 Ariz. 326, 173 P.3d 1027 (App. 2007)....3
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A.R.S. § 13 -1407.E.....4
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A.R.S. §13–1410.A.....4

[iii] **Other**
Webster's New World College Dictionary, 2000.....4

. . .

[2] **II. The Legal versus Affirmative Defense of Lack of Sexual Motivation.**

In the instant case, the defense raised the issue of burden of proof regarding sexual motivation before the trial court. It urged that the burden was on the state to prove, beyond a reasonable doubt, the presence of sexual motivation.

[3] In response, the state relies heavily on this Court's recent opinion, *State v. Simpson.*[11] In that case, the defendant argued on appeal that the trial court should have instructed the jury that his actions were motivated by sexual interest, pursuant to A.R.S. § 13–1407.E.[12] But at the time of trial, the defendant didn't raise the defense, either legally or affirmatively.[13] Because of this, the appellate court concluded that there was no error, fundamental or otherwise.[14] The consequence of the procedural posture of *Simpson* renders the entire analysis of motive versus intent as *obiter dictum.*[15]

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[11] *State v. Simpson*, 217 Ariz. 326, 173 P.3d 1027 (App. 2007).

[12] *Simpson*, 217 Ariz. at 328 ¶ 11, 173 P.3d at 1029 ¶ 11.

[13] *Simpson*, 217 Ariz. at 330 ¶ 23, 173 P.3d at 1031 ¶ 23.

[14] *Simpson*, 217 Ariz. at 330 ¶ 23, 173 P.3d at 1032 ¶ 23.

[15] *Black's Law Dictionary, obiter dictum*: "A judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be (Continued)

The state does raise an interesting point, not one addressed by Arizona appellate courts: the distinction, if any, between motive and intent.[16] Others states, [4] as cited in the answering brief, provide judicial definitions for the terms.[17] But there is no need to create a judicial definition for "motive," as, "Words and phrases shall be construed according to the common and approved use of the language."[18]

Applying this rule to the word "motive," the dictionary defines it as, "some inner drive, impulse, *intention*, etc., that causes a person to do something or act in a certain way; incentive; goal."[19] Thus, for our purposes, the difference between motive and intent is too close to be the basis to reject A.R.S. § 13–1407.E as a legal defense.

A key point that the State fails to address is that both the title of A.R.S. §13-1410.A and its contents refer to "molestation." The word choice formed the keystone of *State v. Brooks*[20] and *State v. Turrentine*,[21] where the statute in question

(Continued).

considered persuasive.), 8th Ed. 2004.

[16] *State vs. Sanderson*, 182 Ariz. 531, 542, 548, 898 P.2d 483, 491, refers in passing to A.R.S. § 13-1407.E as an affirmative defense regarding motive.

[17] *E.g., State v. Hughes*, 125 S.W.2d 66, 70 (Mo. 1939) ("Motive is the moving cause which induces action... Intent is the purpose or design with which an act is done....").

[18] A.R.S. § 1-213.

[19] WEBSTER'S NEW WORLD COLLEGE DICTIONARY, 2000, at 940 (emphasis added).

[20] *State v. Brooks*, 120Ariz. 458, 586 P.2d 1270 (1978).

used the word "molests." Oddly, the cases upon which the State relies fail to mention this fact. It is important to remember that the legislature is presumed to [5] know of the judicial interpretation of a statute and to approve it when it retains the same language in the statute after amendment.[22] That principle applies here, so that the term "molestation" retains an element of sexual motivation.

Contrary to the state's assertion, Mr. May was indeed entitled to the instruction that he was not motivated by a sexual interest, as the trial court correctly concluded. He admitted at trial that he might have touched the genital areas of the two girls, but accidentally and not sexually motivated.[23] He was entitled to the lack of motivation instruction because it was a theory of defense reasonably supported by the evidence.[24]

In *State v. McPhaul*, for example, the trial court refused to give a lesser-included robbery instruction in an armed robbery case, because the defendant said he wasn't there. This Court reversed, holding, "We see nothing inconsistent, illogical or improper about a defendant saying, 'I was not the person who committed the robbery, but even if you do not believe me, the evidence shows that whoever did commit it was not armed.'"[25]

(Continued).

[21] *State v. Turrentine*, 152 Ariz. 61, 730 P.2d 238 (App. 1986).

[22] *Jeter v. Mayo Clinic Arizona*, 211 Ariz. 386, 393 ¶ 31, 121 P.3d 1256, 1253 ¶31 (App. 2005).

[23] T. January 10, 2007 at 39-41, 56.

[24] *State v. McPhaul*, 174 Ariz. 561, 562, 851 P.2d 860, 861 (App. 1992).

[25] *McPhaul*, 174 Ariz. at 562, 851 P.2d at 861.

Here, Mr. May admitted that the touching might have occurred. If so, it was [6] without sexual intent. He clearly falls under the reasoning of *McPhaul*, and was entitled to the instruction.

III. The Discharged Jury Issue is One of Fundamental Error.

. . .

Conclusion. For the error in the jury instruction and in the jury discharge matter, Mr. May is entitled to a new trial. In the alternative, he is entitled to a new sentencing.

RESPECTFULLY SUBMITTED this 5th day of March 2008.

DEBUS, KAZAN, & WESTERHAUSEN, LTD.

By /s/ Tracey Westerhausen
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	) No. 1CA-CR07-0144
	) Superior Court No. CR2006-030290
Plaintiff,	) -001SE
	)
v.	) **Petition for Review to the Arizona**
	) **Supreme Court**
Stephen Edward May,	)
	)
Defendant.	)
	)

Reasons why the petition should be granted (a preview). Mr. May's petition presents two issues to this Court. The first is an opportunity to address the operation of the defenses that appear in A.R.S. § 13-1407 to child molestation (and other sex offenses). On its face, the child molestation

statute has few defenses.[1] For example, a person engaged in lawful medical examinations or emergency help, who contacts a child's genitals, is subject to prosecution, as their acts fall within the literal confines of the statute. For example, a person engaged in lawful medical examinations or emergency help, who contacts a child's genitals, is subject to prosecution, as their acts fall within the literal confines of the statute.

[2] One might think, well, that is silly. The state would never file such a charge; it would have to prove that the person acted with a sexual motivation. That assumption is wrong. Not because of a statute, however, but because of case law. Under A.R.S. § 13-1407, there are defenses to sex offenses such as child molestation, for medical and emergency personnel, and for a person, as in the instant matter, who lacks a sexual motivation.[2] But case law in the instant matter and in *State v. Simpson*[3] says that the defenses in A.R.S. § 13-1407 are instead affirmative defenses that the defendant, not the state, must prove. The statute is entitled "Defenses," and the paragraphs of the statute use the word "defense," but the appellate courts have held that A.R.S. § 13-1407 really establishes affirmative defenses. This result was imposed by the appellate courts, not by the legislature.

The second situation concerns dismissed jurors who are allowed to re-deliberate and reach a verdict, without any inquiry into possible taint between dismissal and re-deliberation. This case presents an opportunity to provide further assistance to

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[1] A.R.S. § 13-1410.A. "Molestation of child... E. A person commits molestation of a child by intentionally or knowingly engaging in . . . sexual contact ... with a child under fifteen years of age."

[2] A.R.S. § 13-1407. Defenses. "... It is a defense to a prosecution (for child molestation) that the defendant was not motivated by a sexual interest."

[3] *State v. Simpson*, 217 Ariz. 326, 173 P.3d 1027 (App. Dec. 18, 2007).

judges and lawyers faced with a request by a discharged hung-jury, asking the trial court if it may "deliberate" again after all.

2. Issues presented to and decided by the Court of Appeals.

A. A.R.S. § 13-1407, entitled "Defenses," enumerates defenses to child molestation. Subpart E provides that, "it is a defense" to child molestation "that [3] the defendant was not motivated by a sexual interest." The Court of Appeals held that A.R.S. § 13-1407.E created an *affirmative defense*, thus shifting the burden of proof to the defendant. Did the Court of Appeals erroneously shift the burden of proof to the defendant, to prove that he was not sexually motivated?

B. Under the state and federal constitutions, a defendant is guaranteed a trial by a fair and impartial jury, including a jury free from taint by outside sources. The jurors here were discharged, minutes passed, and the dismissed jurors were allowed to re-deliberate. Is Mr. May entitled to a new trial because the trial court failed to explore jury taint that may have deprived Mr. May of a fair trial?

3. Facts.

Mr. May was charged with seven counts of child molestation, and went to trial. During jury instructions, the defense argued that the jurors must be instructed that the state bore the burden of proving beyond a reasonable doubt that Mr. May was motivated by sexual interest during the incidents. This was in accordance with A.R.S. § 13-1407.E. The trial judge rejected the argument, finding that lack of sexual motivation was an affirmative defense that must be established by the defense, and by a preponderance of evidence.

. . .

The Court of Appeals affirmed the convictions. For the sexual motivation issue, the decision relied on a recent opinion, *State v. Simpson*.[4] For the second issue, the Court rejected a large body of case law cautioning against re-deliberation by a discharged jury without inquiry of taint, including *State v. Crumley*.[5]

4. Reasons why the Court should grant review.

A. Defenses v. affirmative defenses. The defenses statute, A.R.S. § 13- 1407, operates in tandem with predicate offense statutes, such as sexual abuse[6], sexual conduct with a minor[7], and child molestation.[8] Previously, in *State v. Getz*[9], [5] this Court accepted a petition addressing the interaction between a § 13-1407 defense and a charge of sexual abuse. "We did so," the Court said, "in the hope of providing some guidance concerning the proper interpretation of these confusing statues and the equally confusing case law they have produced."[10]

With Mr. May's case, the Court can correct an important issue of law that was wrongly decided. The lack of sexual motive defense under A.R.S. § 13-1407.E is just that, a defense, and not an affirmative defense, to the predicate offense.

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[4] *State v. Simpson*, 217 Ariz. 326, 173 P.3d 1027 (App. Dec. 18, 2007).

[5] *State v. Crumley*, 128 Ariz. 302, 305-06, 625 P.2d 819, 894-95 (1981).

[6] A.R.S. § 13-1404.

[7] A.R.S. § 13-1405.

[8] A.R.S. § 13-1410.

[9] *State v. Getz*, 189 Ariz. 561, 562, 944 P.2d 501, 504 (1997) (holding that judgment of acquittal should have been granted where undisputed evidence showed that 16 year old victim consented to conduct).

[10] *Getz*, 189 Ariz. at 562, 944 P.2d at 504.

What reasons support this argument? There are at least four.

First, in looking at the language of the statute, it is labeled as defense, and the word "affirmative" nowhere appears in the text. If statutory language is clear, the courts need not resort to other methods of statutory construction.[11] The legislature has said that A.R.S. § 13-1407 is comprised of defenses.

Second, the courts "discern and give effect to the legislature's intent."[12] Unless the language of a statute is unclear, there is no need to look beyond its plain meaning.[13] As was argued above, A.R.S. § [13-1407] nowhere uses the word "affirmative" in listing defenses.

[6] Third, the statutory definitions of a legal defense and affirmative defense are consistent with the defense position. The legislature defined a legal defense as one that "either denies an element of the offense charged or denies responsibility, including alibi, misidentification or *lack of intent*."[14] (Emphasis added.) In contrast, the legislature delineated an "affirmative defense" as one that "attempts to justify the criminal action of the accused."[15]

Fourth, statutes on the same subject matter are read together and harmonized to avoid an absurd result.[16] Interpreting A.R.S. §13-1407 as a list of "affirmative defenses" leads to the absurd result that every person who touches a child's genitals whether

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[11] *State v. Riggs*, 189 Ariz. 327, 333, 942 P.2d 1159, 1165 (1997)
[12] *State vs. Dixon*, 216 Ariz. 18, 20, ¶ 7, 162 P.3d 657, 659, ¶ 7 (App. 2007).
[13] *Dixon*, 217 Ariz. at 18, ¶ 7, 162 P.3d at 659,¶ 7.
[14] A.R.S. § 13-103.B.
[15] A.R.S. § 13-103.B.
[16] *State v. Johnson*, 171 Ariz. 39, 42, 827 P.2d 1134, 1137 (App. 1992).

at a doctor's office or rescue scene may be charged with child molestation and then must prove the defense. That incongruous result falls away if the statute provides, as it says it does, a list of defenses which the state much [sic] prove, and prove beyond a reasonable doubt.

Mr. May is entitled to a new trial, with the burden of proof properly allocated to the state, beyond a reasonable doubt.

[7] **B. Discharged jury.** From the record, it is true that it appears only a few minutes passes between the jurors announcing their deadlock and their request to return to deliberations. On this basis, the Court of Appeals rejected Mr. May's argument.

. . .

RESPECTFULLY SUBMITTED this 29th day of September, 2008.

DEBUS, KAZAN, & WESTERHAUSEN, LTD.

By /s/ Tracey Westerhausen
Tracey Westerhausen
Attorneys for Defendant

Supreme Court
State of Arizona
402 Arizona State Courts Building
1501 West Washington Street
Phoenix, Arizona 85007-3231

February 10, 2009

RE: **STATE OF ARIZONA v STEPHEN EDWARD MAY**
Arizona Supreme Court No. CR-08-0281-PR
Court of Appeals Division One No. 1 CA-CR 07-0144
Maricopa County Superior Court No. CR2006-030290-001 SE

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on February 10, 2009, in regard to the above-referenced cause:

ORDERED: Petition for Review to the Arizona Supreme Court = DENIED.

Record returned to the Court of Appeals, Division One, Phoenix, this 10th day of February 2009.

Rachelle M. Resnick, Clerk
TO:
Robert A. Walsh, Assistant Attorney General, Arizona Attorney General's Office
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Stephen Edward May, ADOC #214465, Arizona State Prison, Florence Eyman Complex-Meadows Unit
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IN THE SUPREME COURT
STATE OF ARIZONA

STATE OF ARIZONA,	) No. CR-02811CA-CR07-0144
	)
Plaintiff,	) Court of Appeals No. 1 CA-CR
	). 2006-0144
v.	)
	) Superior Court No. CR2006-030290
Stephen Edward May,	) -001SE
	)
Defendant.	) **Motion for Reconsideration of**
	) **Denial of Review**

Defendant Stephen May asks this Court to revisit its decision to decline review. Mr. May's situation presents significant, recurring legal issues regarding two of the most important constitutional protections that our system of justice guarantees to criminal defendants: the right to convicted only upon proof beyond a reasonable doubt and the tried to be tried before an impartial jury. Underscoring the significance of the statewide constitutional issues presented on this case, the Arizona Attorneys for Criminal Justice, simultaneously with the filing of [2] the motion, have asked leave to file an *amicus*

curiae brief to assist in bringing to the attention the important questions presented by Mr. May's case.

Current Procedural Posture

This Court denied review of Mr. May's petition on February 10, 2009. He asked the Court of Appeals to stay the issuance of the mandate. The Court granted the motion on February 27, 2009, providing a 90-day window for further action. That same date, the state filed an opposition to the defense stay request. It then followed with a motion to reconsider the grant of the stay of mandate. The defense advised that it would file nothing further regarding the stay unless requested by the Court. The Court of Appeals has not ruled on the state's motion to reconsider the stay issue.

A. Summary of the Facts.

To refresh the Court's recollection, here's a synopsis of the facts.

Mr. May was charged with seven counts of child molestation,[1] and went to trial. During jury instructions, the defense argued that the jurors must be instructed that the state bore the burden of proving beyond a reasonable doubt that Mr. May was motivated by sexual interest during the incidents. This was in accordance with [3] A.R.S. § 13-1407.E.[2] The trial judge rejected the argument, finding that lack of sexual motivation

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[1] A.R.S. § 13-1410.A. "Molestation of child. "A person commits molestation of a child by intentionally or knowingly engaging in . . . sexual contact . . . with a child under fifteen years of age."

[2] A.R.S. § 13-1407. Defenses. "... It is a defense to a prosecution (for child molestation) that the defendant was not motivated by a sexual interest."

was an affirmative defense that must be established by the defense, and by a preponderance of the evidence.

. . .

The Court of Appeals affirmed the convictions. For the sexual motivation issue, the decision relied on a recent opinion, *State v. Simspon*.[3] . . .

[4] The Issues Presented

1. The child molestation statute violates due process because it relieves the state from proving every element of the charged crime beyond a reasonable doubt. First, the statute does this by making too many everyday and innocent acts fall within its definition of child molestation. Second, although the legislature has broad authority to define the elements of a crime, it may not lower the state's burden of proof by calling an "element" something else.[4]

. . .

Conclusion

The facts and the law join here to give this Court the opportunity to scrutinize and clarify re-appearing constitutional issues of statewide importance. AACJ has [5] offered its aid in doing so. Certainly, the issues and AACJ's interest in them are reasons justifying a reconsideration of the denial of review. If

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[3] *State v. Simpson*, 217 Ariz. 326, 173 P.3d 1027 (App. Dec. 18, 2007).
[4] *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000).

there were ever a case about which the denial of review should be reconsidered, it is this one.

RESPECTFULLY SUBMITTED this 24th day of March, 2009.

DEBUS, KAZAN, & WESTERHAUSEN, LTD.

By /s/ Tracey Westerhausen
Tracey Westerhausen
Attorneys for Defendant

2006 Ariz. Legis. Serv. Ch. 199 (S.B. 1145)

CHAPTER 199
S.B. 1145
DEFENSES OF CRIMINAL CONDUCT

AN ACT AMENDING SECTIONS 13-103, 13-205 AND 13-411, ARIZONA REVISED STATUTES; AMENDING TITLE 13, CHAPTER 4, ARIZONA REVISED STATUTES, BY ADDING SECTIONS 13-418, 13-419 AND 13-420; AMENDING LAWS 1983, CHAPTER 255, SECTION 1, AS AMENDED BY LAWS 1990, CHAPTER 410, SECTION 3; RELATING TO DEFENSES OF CRIMINAL CONDUCT.

Be it enacted by the Legislature of the State of Arizona:

Section 1. Section 13-103, Arizona Revised Statutes, is amended to read:

§ 13-103. Abolition of common law offenses and affirmative defenses; definition

A. All common law offenses and affirmative defenses are abolished. No conduct or omission constitutes an offense or an affirmative defense unless it is an offense or an affirmative defense under this title or under another statute or ordinance.

B. For the purposes of this section, "affirmative defense" means a defense that is offered and that attempts to ~~justify~~ excuse the criminal actions of the accused or another person for whose actions the accused may be deemed to be accountable. Affirmative defense does not include any justification defense pursuant to chapter 4 of this title or any defense that either denies an element of the offense charged or denies

responsibility, including alibi, misidentification or lack of intent.

Sec. 2. Section 13-205, Arizona Revised Statutes, is amended to read:

§ 13-205. Affirmative defenses; burden of proof

A. Except as otherwise provided by law, a defendant shall prove any affirmative defense raised by a preponderance of the evidence, ~~including any justification defense under chapter 4 of this title~~. Justification defenses under chapter 4 of this title are not affirmative defenses. Justification defenses describe conduct that, if not justified, would constitute an offense but, if justified, does not constitute criminal or wrongful conduct. If evidence of justification pursuant to chapter 4 of this title is presented by the defendant, the state must prove beyond a reasonable doubt that the defendant did not act with justification.

B. This section does not affect the presumption contained in section 13-411, subsection C and section 13-503.

Arizona Rule of Criminal Procedure 31.25:

a. Filing and Form of Brief; Participation in Oral Argument. A brief of an *amicus curiae* may be filed only if accompanied by written consent of all parties or by leave of court granted upon motion. The brief shall be lodged with the motion, if any. The motion for leave shall identify the interest of the applicant, state that the applicant has read the relevant brief, petition or motion and shall state the reasons accepting applicant's *amicus curiae* brief would be desirable. A party desiring to respond to the amicus brief shall file the response within 20 days of service of a brief filed with consent, or within 20 days of the Court's order granting a motion for leave to file an *amicus* brief. Rules 31.13, Arizona Rules of Criminal Procedure shall govern the form of an *amicus* brief, except that it shall not exceed 12,000 words in length if done in proportionately spaced typeface, or 35 pages if done in monospaced typeface, unless otherwise permitted by the court. An *amicus curiae* may participate in the oral argument only by leave of the appellate court.

b. Time and Length Limits Applicable to *Amicus* Briefs in the Supreme Court. Parties desiring to file an *amicus curiae* brief shall file such briefs as provided by this rule, except that an *amicus curiae* brief relating to a special action petition shall be filed as expeditiously as possible after the special action petition is filed, as provided for in Rule 7(g), Rules of Procedure for Special Actions.

(1) Briefs filed prior to a decision by the Court to grant review. Unless otherwise ordered by the Court, an *amicus* brief in support of a petition for review or a response to a petition for review accompanied by written consent of all parties, or a motion for leave to file the brief shall be filed no later than 21

days after the filing of the response to the petition for review. Such briefs shall comply with the form and length requirements of Rule 31.19(c) exclusive of any appendix.

(2) Briefs filed after the Court has granted review. After the Court has granted review, and unless otherwise ordered, an *amicus* brief accompanied by written consent of all parties, or a motion for leave to file an *amicus* brief, shall be filed no later than 10 days after the date ordered by the Court at the time review was granted for filing supplemental briefing by the parties in the particular case. Such briefs shall comply with rule 31.13 and shall not exceed the page limitation imposed for the parties' supplemental briefs.

(3) Responses to *amicus curiae* briefs. A party wishing to respond to an *amicus* brief shall file the response within 20 days of service of a brief filed with consent or within 20 days of the court's order granting a motion for leave to file an *amicus* brief. The response shall comply with the page and formatting requirements imposed on the particular *amicus* brief to which it relates.

(4) Late-filed briefs and responses. Leave for filing a late *amicus* or response brief shall be granted only for good cause shown.